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CASE NO. 91-930

IN THE

United States Supreme Court

OCTOBER TERM, 1991

MURRELL DWAIN FOSTER
AND CAROLYN LORETTA FOSTER,
Petitioners,

v.

NORTH TEXAS PRODUCTION CREDIT ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

I. STATEMENT OF JURISDICTION

The Petition for Certiorari arises from a final judgment of the United States Bankruptcy Court for the Northern District of Texas, Lubbock Division, as affirmed by the United States District Court for the Northern District of Texas, Lubbock Division, and as affirmed by the Court of Appeals for the Fifth Circuit. This Court has jurisdiction over certain aspects of this appeal pursuant to 28 U.S.C. § 1254(1).

II. STATEMENT OF ISSUES

1. The only issue properly before this Court if a Writ of Certiorari is granted is whether, by his Order Converting Case to Chapter 7 entered November 27, 1990 (the "Conversion Order"), the Honorable Judge John C. Akard of the United States Bankruptcy Court for the Northern District of Texas, Lubbock

Division (the "Bankruptcy Court") erred in converting the Chapter 12 bankruptcy case of Appellants, Murrell Dwain Foster and Carolyn Loretta Foster (the "Fosters"), from a case under Chapter 12 to a case under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq* (the "Bankruptcy Code"). The Bankruptcy Court converted the case to Chapter 7 in accordance with 11 U.S.C. 1208(d), upon finding that the Fosters had committed fraud in connection with their bankruptcy case upon the Bankruptcy Court, and upon Respondent, the North Texas Production Credit Association (the "PCA"). The United States District Court for the Northern District of Texas, Lubbock Division affirmed the Conversion Order on December 27, 1990, and on September 9, 1991, the Fifth Circuit Court of Appeals affirmed *per curiam*.

2. The Fosters improperly seek to multiply the issues to be considered by this Court to include matters outside the scope of this appeal. The Fosters seek to add questions regarding the jurisdiction of the Bankruptcy Court, and the standing of the PCA to seek conversion.

III. STATEMENT OF THE CASE

A. Procedural Background

3. On June 5, 1989, on the eve of foreclosure sales scheduled by the PCA against certain real property, the Fosters jointly filed in the Bankruptcy Court a Voluntary Petition for Relief under Chapter 12 of the Bankruptcy Code. On July 5, 1989, the Fosters filed with the Bankruptcy Court their Schedules, Statement of Financial Affairs and Chapter 12 Statement (the "Schedules"), which included the Fosters' declaration of exempt property. On August 14, 1989, the PCA timely filed its objection to the Fosters claim of exceptions, primarily because these claimed exemptions included a homestead claim materially different from that claimed at the time the PCA initially made its loan to the Fosters.

4. On January 31, 1990, the Bankruptcy Court entered its Order Confirming Debtors Chapter 12 Plan of Reorganization (the "Confirmation Order"). This Chapter 12 Plan was a consensual Plan proposed by the Fosters and approved by the PCA. However, the Fosters failed to perform under their Chapter 12 Plan. On August 17, 1990, after the PCA filed a motion complaining of the Fosters failure to perform, the Bankruptcy Court entered its Order on Motion to Dismiss Bankruptcy (the "Dismissal Order") which was agreed to by the Fosters both as to form and substance. Both the Confirmation Order and the Dismissal Order directed the Fosters to: (a) vacate and convey to the PCA certain property located in Bowie County and Red River County, Texas (the "East Texas Property"), against which the PCA held a valid lien, in exchange for an agreed credit against their debt to the PCA; and (b) execute loan documents memorializing the restructure of the remaining debt required under the Plan to be repaid. The Dismissal Order directed the Fosters to:

> execute and deliver to the PCA a Special Warranty Deed in a form acceptable to counsel for the Debtor and the PCA, conveying to the PCA the Debtor's real property and improvements in Bowie and Red River Counties ("East Texas Property"), free and clear of all liens, claims, and encumbrances for a credit of $277,000.00 on the present indebtedness of the Debtors to the PCA. Alternatively, the PCA is authorized to foreclose upon the East Texas Property and shall credit the present indebtedness of the Debtors in a bid of not less than $277,000.00.

The Dismissal Order also directed the Fosters "to execute and deliver to the PCA loan and security documents . . . continuing the PCA's pre-petition lien and security interests in the Debtor's real property and improvements in Deaf Smith County, Texas, as described in the Chapter 12 Plan confirmed by this Court on or about January 31, 1990 ("Plan")."

5. After the Fosters failed to comply with the Dismissal Order, and in accordance with the Dismissal Order, the PCA posted the East Texas Property and certain property located in Deaf Smith County, Texas (the "West Texas Property"), against which the PCA held a valid lien, for nonjudicial foreclosure sales to occur on October 2, 1990. On the eve of the scheduled foreclosure sales, the Fosters filed suit against the PCA in Hereford County, Texas (the "State Court Litigation"), and obtained an *ex parte* temporary restraining order without bond, preventing the scheduled foreclosure sales. Among the claims asserted, for the first time ever in their dealings with the PCA and the Bankruptcy Court, the Fosters claimed a two hundred (200) acre homestead in the East Texas Property which was supposed to have been conveyed to the PCA under the Confirmation Order and the Dismissal Order.

6. On October 10, 1990, the PCA removed the State Court Litigation to the United States District Court for the Northern District of Texas, Amarillo Division, and requested that the matter be referred to the Lubbock Bankruptcy Court. On November 1, 1990, the Honorable Judge Mary Lou Robinson for the Amarillo Court entered an Order referring the removed State Court Litigation to the Bankruptcy Court, and the case was assigned Adversary No. 590-5060 (the "Adversary Action"). The Adversary Action is not before the Court, nor was any issue in the Adversary Action before any of the lower courts.

7. On October 1, 1990, the Fosters filed a Motion for Voluntary Dismissal of the Bankruptcy Case with the Bankruptcy Court (the "Dismissal Motion"). However, the Dismissal Motion was not properly served on creditors and parties-in-interest as required under the federal and local Bankruptcy Rules of Procedure until, at the earliest, November 9, 1990. On October 16, 1990, well prior to proper service of the Dismissal Motion, the PCA filed its Motion to Convert Bankruptcy Case to Chapter 7 Case Under Bankruptcy Code Section 1208(d) (the "Conversion Motion").

The Conversion Motion and the Dismissal Motion were set for hearing on November 26, 1990, along with the requests of the Fosters in the Adversary Action for a preliminary injunction, and for a remand of the Adversary Action to state court. Only the Conversion Motion and the Dismissal Motion were reached on November 26, 1990, for the following reasons: (a) the Fosters asked for a continuance of their preliminary injunction request; (b) the Fosters announced that their prior pending request for a temporary restraining order was moot; and (c) the Bankruptcy Court did not take up the remand issue in the Adversary Action as the Chapter 7 trustee to be appointed would succeed as the proper party plaintiff to a number of the claims in that suit. No subsequent hearing on the temporary injunction request or the request for remand of the Adversary Action has been requested or scheduled.

8. On November 26, 1990, after consideration by Judge Akard of the testimony before him, the documents offered into evidence, and the conduct of the Fosters during their bankruptcy case, Judge Akard entered an order converting the Fosters Chapter 12 bankruptcy case to a Chapter 7 liquidation. The evidence presented lead Judge Akard to conclude that conversion was the appropriate remedy for the Fosters fraud upon the Bankruptcy Court, and fraud upon the PCA. These fraud findings were based upon the Debtors sworn misrepresentations as to their homestead in their Bankruptcy Schedules, the misrepresentations of the Fosters in their bankruptcy Plan, the unfulfilled representations of the Fosters to vacate and convey the East Texas Property to the PCA and execute loan documents as required by their confirmed Plan, the failure of the Fosters to comply with the Dismissal Order, and the clear intention of the Fosters to not carry out the promises they made to the PCA and to the Bankruptcy Court.

B. Substance of the Dispute Before This Court

9. The Fosters assert that their bankruptcy case should have been dismissed rather than converted. Alternatively, the Fosters

argue that their bad conduct did not rise to the statutory standard of fraud in connection with their bankruptcy case. However, the recitations by the Fosters in their Brief of Petitioners, p. 14, that they "attempted all junctures to obey all lawful orders of the [bankruptcy] court" is false and specious. Their decision to ignore the Bankruptcy Court's Orders and their own counsel's advice indicates only their bad faith in dealing with the PCA and the Bankruptcy Court. Further, the Fosters provided no evidence to the Bankruptcy Court that the loan documents they refused to execute varied from the terms of their confirmed Plan.

IV. REASONS FOR NOT GRANTING THE WRIT

A. The lifting of the automatic stay by the Bankruptcy Court, with the agreement of the Fosters, to allow the PCA to foreclose its real property liens is not a basis for granting the writ as: (1) the conversion order appealed from does not arise out of nor is it related to the lifting of the automatic stay; and (2) the lifting of the stay does not deprive the Bankruptcy Court of jurisdiction over the Fosters.

1. The Conversion Order appealed from does not arise out of nor is it related to the lifting of the automatic stay.

10. The Fosters attempt to obfuscate the issues which would properly be before this Court if a writ of certiorari is granted. There is no issue of the Bankruptcy Court's jurisdiction over the Conversion Motion. The issue of jurisdiction arises only in the Adversary Action, which is not before this Court, and was not before any of the lower courts. As noted, the PCA was authorized to foreclose its real property liens in October 1990. The Fosters prevented the foreclosures from being held. What the PCA complained of in its Conversion Motion is that the Fosters had misrepresented to the Bankruptcy Court and the PCA their intentions to comply with their Plan. The fact that the Fosters

filed a lawsuit in state court is not why their Chapter 12 case was converted or sought converted, nor was the Conversion Motion "predicated on the claims which the Fosters sought to litigate in state court." (Petition for Writ, p. 3). Further, the Conversion Order had no dispositive effect on the Adversary Action, nor did it constitute an assertion of jurisdiction over the Adversary Action. The Fosters' Chapter 12 case was converted because the Fosters lied about their intentions to convey and vacate the East Texas Property and execute the necessary loan documents, and lied in their bankruptcy Schedules.

11. Further, the proper forum for the Adversary Action is not before this Court, nor was it before the lower appellate court. The Fosters argument that the Bankruptcy Court lacked jurisdiction over the "state law remedies" asserted by the Fosters in the Adversary Action (Petition for Writ, p. 3) goes to and was raised by the Fosters when they requested the Bankruptcy Court remand the Adversary Action to State Court. However, no ruling on the remand request was made by the Bankruptcy Court, nor is any such order before this Court, nor was any such order before the lower appellate courts. The question of the Bankruptcy Court's jurisdiction over the "state law remedies" asserted by the Fosters is therefore irrelevant to the Petition for Writ, and is not a reason to grant the writ. Even given the broadest possible reading of *Wilson v. Bill Barry Enterprises, Inc.*, 822 F.2d 859 (9th Cir.), no conflict between the circuit courts of appeals can be read into the Fifth Circuit's *per curiam* affirmance of the District Court's reported opinion, *In re Murrell D. and Carolyn L. Foster*, 121 B.R. 961 (N.D. Tex. 1990), as no issue of jurisdiction was decided by the lower courts.

2. The lifting of the stay does not deprive the Bankruptcy Court of jurisdiction over the Fosters.

12. The Bankruptcy Court did not relinquish jurisdiction over the Fosters by allowing the PCA to seek foreclosure of its collateral. This argument by the Fosters is without merit. *See*

generally In re Fricker, 113 B.R. 856 (Bankr. E.D. Pa. 1990); *In re Ridgemont Apartment Associates*, 105 B.R. 738 (Bankr. N.D. Ga. 1989); *In re Desmarais*, 33 B.R. 27 (Bankr. D. Me 1983). The Bankruptcy Court could continue to exercise jurisdiction over the Fosters and over the East Texas Property and the West Texas Property until some action was taken compelling the Bankruptcy Court to relinquish jurisdiction. *In re Oakes*, 129 B.R. 477, 479 (Bankr. N.D. Ohio 1991) (relief from stay to pursue collection of collateral, rents, does not constitute relinquishment of jurisdiction over the rents); *In re Foster*, 105 B.R. 746, 748 (Bankr. M.D. Ga. 1989) (after creditor was granted relief from stay to pursue a foreclosure sale, bankruptcy court retained jurisdiction to determine if foreclosure sale should be set aside on procedural grounds).

13. Further, the *Wilson* opinion relied on by the Fosters does not hold that a bankruptcy court relinquishes jurisdiction over property or a dispute by virtue of a lifting of the stay. In *Wilson*, a landlord was allowed relief from the stay to pursue termination of a lease. In state court, the debtor/lessee filed a petition under California law for reinstatement of the lease. This action was removed to federal court, and was dismissed because both the state court and the federal court lacked jurisdiction over the removed action. The Ninth Circuit affirmed the dismissal, because when the stay was originally lifted, the lessee's right to seek reinstatement was eliminated. *Wilson*, 822 F.2d at 860-61. All *Wilson* held was that since the termination of the stay included elimination of the right to seek reinstatement, there was no dispute over which to assert jurisdiction. It is entirely appropriate to "not read *Wilson* to hold that granting relief from stay automatically divests the bankruptcy court of jurisdiction over the estate property involved." *Oakes*, 129 B.R. at 479.

B. The Fosters demonstrate no basis to grant a writ, as the United States Courts of Appeals are uniform that a Bankruptcy Court may convert a Bankruptcy Case from Chapter Twelve to Chapter Seven even if the Debtor seeks dismissal.

14. The protections of the Bankruptcy Code, and Chapter 12 in particular, are reserved for those family farmers who pursue repayment of their debt honestly, and in good faith. *In re Reinbold*, 110 B.R. 442, 445 (Bankr. D.S.D. 1990). This same purpose is found in the legislative history to Chapter 12 which states in relevant part:

> Section 1208 is designed to encourage *good faith and honest dealing* by the debtor throughout his Chapter 12 case. If fraud is found, the case will be dismissed or converted to Chapter 7.

H.R. Conf. Rep. No. 958, 99th Cong., 2d Sess., 132 Cong. Rec. 15076 (Daily Ed. Oct. 3, 1986). *Reinbold*, 110 B.R. at 445 (emphasis supplied). *See also In re Zurface*, 95 B.R. 527, 529 (Bankr. S.D. Ohio 1989). A Chapter 12 case may only be converted to a Chapter 7 liquidation if the Bankruptcy Court finds fraud in connection with the case. 11 U.S.C. § 1208(d).

15. In converting the Fosters Chapter 12 case to Chapter 7, the Bankruptcy Court stated as follows:

> On two occasions the Debtors have promised to vacate the East Texas Property and to convey it to the PCA. They are now attempting to defeat PCA by claiming the East Texas Property is their homestead. This clearly indicates to the Court that they had no intention of carrying out their promise nor of abiding by the Orders of this court. The Court finds that the Debtors, both Mr. Foster and Mrs. Foster, have committed fraud upon the PCA and upon this Court.

16. In affirming the Bankruptcy Court, Judge Cummings of the District Court found from his review of the record that the

Fosters had abused the Bankruptcy Court and had "used the bankruptcy proceeding as a 'shell game' reflecting a pattern of intent to hinder, delay and defraud creditors." *In re Murrell D. and Carolyn L. Foster,* 121 B.R. 961 (N.D. Tex. 1990). By affirming, the Fifth Circuit implicitly held that conversion to Chapter 7 under Section 1208(d) may be ordered even if the debtor seeks dismissal under Section 1208(b).

17. However, the Fifth Circuit opinion is in agreement with the decision of the Eighth Circuit in *In re Graven,* 936 F.2d 378 (8th Cir. 1991). The *Graven* court determined that Sections 1208(b) and 1208(d) of the Bankruptcy Code need to be read together so as to avoid "endless abuse of the bankruptcy process . . ." *Graven,* 936 F.2d at 385. The *Graven* court stated as follows:

> We conclude that the broad purpose of the Bankruptcy Code, including Chapter 12, is best served by interpreting Section 1208(d) to allow a court to convert a case to Chapter 7 upon a showing of fraud even though the debtor has moved for dismissal under subsection (b). Our holding on the interaction of subsections (b) and (d) does not conflict with the express language of subsection (b).

Id.

18. *Graven* went on to hold "that once fraud has become an issue in the case, the court may delay action on a Section 1208(b) motion for dismissal long enough to allow an investigation of the alleged fraud. If fraud is shown, the court may, under 11 U.S.C. § 1208(d), convert the Chapter 12 case to Chapter 7 despite the debtor's motion to dismiss." *Graven,* 936 F.2d at 387. Thus, the only circuit courts of appeal to address this issue are in harmony.

19. This construction of § 1208 is consistent with this Court's analysis of the Bankruptcy Code in *In re Timbers of Inwood Forest Associates, Ltd.,* 108 S.Ct. 626 (1988). In *Timbers,* in deciding whether an undersecured creditor was entitled to post-petition adequate protection, this Court noted that "Statutory

construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . ." *Id.*, 108 S.Ct. at 630. This Court also noted that the construction provided must produce "a substantive effect that is compatible with the rest of the law . . ." *Id.* (citations omitted).

20. Further, the Fifth Circuit has also noted that "Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings." *In re Little Creek Dv. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986). In *Little Creek*, the court determined that a bankruptcy proceeding must be filed in good faith to prevent abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes. Moreover, a good faith standard "protects the jurisdictional integrity of the bankruptcy courts. . ." *Id.* at 1072. Analyzing a debtor's request to dismiss a case in light of the overriding good faith requirements of the Bankruptcy Code is entirely consistent with *Timbers* and *Little Creek*. The Fosters have proven themselves to not be honest debtors, and Judge Akard properly so found.

C. Writ should not be granted as the fraud of the Fosters was sufficient to convert their Case to Chapter 7.

21. As to an issue of fact raised by the Fosters, the standards applied by Judge Akard and approved by the Fifth Circuit on conversion for fraud do not create a conflict between the United States courts of appeals, nor do they constitute so for a departure from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its power of supervision. In *In re Caldwell*, 101 B.R. 728 (Bankr. D. Utah 1989) the court found fraud because the debtor had initially filed a Chapter 13 petition and had prepared a Chapter 13 statement listing assets at about $423,033.00. The debtor then filed a motion to convert to Chapter 12 and submitted a Chapter 12 Statement which omitted a

substantial number of assets. The debtor's testimony and continuing failure to file accurate asset and liability lists supported the court's finding that the omission of the assets and liabilities on the Chapter 12 statement was intentional.

22. In *In re Zurface*, 95 B.R. 527 (Bankr. S.D. Ohio 1989), the court found that the actions of the debtor both pre-petition and post-petition were fraudulent. Prior to filing bankruptcy, the debtors formed a corporation and transferred all assets to the corporation. In addition, a debtor's sister was named trustee of a claimed oral trust which was allegedly created by the corporation for the benefit of the children of the debtors. This trustee had virtually no involvement in or knowledge of the management of the corporation. In fact, the debtor's son dominated and controlled the corporate affairs both before and after the property was conveyed to the corporation. The transfer of the assets to the corporation was made for inadequate consideration. The debtors never requested or obtained salary or other compensation from the corporation for managing the assets. Based upon these facts, the court found that the transfer of assets to the corporation constituted a fraudulent conveyance. Therefore the Chapter 12 Plan was found to not have been proposed in good faith, and the motion to convert to Chapter 7 was granted.

23. In *In re Reinbold*, 110 B.R. 442 (Bankr. D.S.D. 1990), during bankruptcy proceedings, the debtor agreed to surrender certain farm equipment and machinery to a secured party. The debtor then placed the serial plates from the agreed upon property on less expensive property which was then surrendered to the creditor. In addition, the debtor had previously "sold" certain equipment to another person in violation of the security agreement with the secured party. The court found that this improper transfer of property for no consideration was enough evidence of fraud to justify conversion of the case to Chapter 7.

24. Finally, in *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989), *affirmed*, 936 F.2d 376 (8th Cir. 1991), one of the debtors

formed a corporation in which he was the sole incorporator, the president, one of the two directors and the sole shareholder. Thereafter, he conveyed large tracts of real estate and livestock to the corporation for no consideration. Also, a substantial number of promissory notes, deeds of trust and accounts receivable were transferred to the company. The debtor then transferred all the stock of this corporation and another corporation which he controlled to his son as trustee for an irrevocable trust which he established. The son testified that he had received no money, managed no assets and done nothing in regard to the corporations or as to the assets that the corporations purportedly owned. Finally, there was evidence that the debtors had intentionally made misstatements in statements filed with the court. All of these factors lead the court to conclude that the debtors had deliberately perpetrated fraud with the intent to hinder, delay and defraud the creditors.

25. The Fosters argue that their fraud was not as egregious as that of the debtors in *Caldwell, Zurface, Reinbold,* and *Graven,* and therefore conversion was not warranted. However, the Bankruptcy Code does not set a specific threshold of how much fraud or bad faith is sufficient for conversion. What the Bankruptcy Code requires through § 1208(d) is that the Fosters pursue repayment of their debts honestly and in good faith. This the Fosters did not do, and came nowhere close to doing.

26. The Fosters assert that their disobedience of the Bankruptcy Court's Orders based on "uncontroverted evidence before the bankruptcy court was that the then-attorneys for the debtors provided documents for the Fosters to sign which did not contain the agreement of the parties." (Petition for Writ, p. 14). This statement is patently false. There was no evidence before the Bankruptcy Court that the documents the Fosters refused to sign varied one iota from the consensual Chapter 12 Plan. The Fosters own bankruptcy counsel instructed the Fosters to execute the loan documents in order to comply with their Plan. They decided not

to. Further, the Fosters failure to execute the loan documents does not explain their failure to convey and vacate the East Texas Property, in violation of the Confirmation Order and the Dismissal Order.

27. The standard adopted by the Bankruptcy Court for conversion, if deemed implicitly approved by the Fifth Circuit, is not in conflict with any standard adopted by any other court of appeals, nor is such standard so far a departure from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its power of supervision.

D. The Fosters have demonstrated no basis to grant a Writ, as the PCA had standing to seek conversion of the Bankruptcy Case.

28. The PCA had standing to seek conversion of the Bankruptcy Case. Without waiving its argument as to the procedural right of the Fosters to raise this issue which was not raised to the trial court, the PCA would note that the argument that the PCA lacked standing to seek conversion (Petition for Writ, p. 7) is ludicrous at best, if not wholly facetious. Under § 1208(d) of the Bankruptcy code, a party-in-interest may seek conversion. The phrase "party-in-interest" is defined by inclusion in § 1109(b) of the Bankruptcy Code to include but not be limited to "the debtor, the trustee, a creditor's committee, equity security holder's committee, a creditor, an equity security holder, or any indenture trustee. . . ." The PCA is unquestionably a creditor of the Fosters, with a secured debt at the time of the conversion trial in excess of $1,000,000.00.

29. The Fosters make the ridiculous argument that under the confirmed Plan, the PCA would have no unsecured claim, given that the East Texas Property would be conveyed to the PCA, and the debt associated with the West Texas Property would be restructured. Had the Fosters ever intended to or ever attempted to comply with their Plan, then arguably the PCA would not not be an unsecured creditor, but it would still be a secured creditor and therefore a party-in-interest. However, as is blatantly clear from the record, the Fosters have failed to comply with their confirmed Plan.

30. In addition, the term creditor is defined in § 101(9) of the Bankruptcy Code to include an entity that has a claim against a debtor that arose at the time or before the order for relief concerning the debtor. The PCA unquestionably had an unpaid claim against the Fosters that arose at or before the time the order for relief was entered. The fact that the claim happens to be or have been secured does not render the PCA any less a creditor than an unsecured creditor would be. The argument of a lack of standing of the PCA is purely a frivolous and unwarranted argument.

WHEREFORE, the PCA respectfully prays that this Court deny the Petition for Writ of Certiorari, affirm the Order of the Bankruptcy Court Converting Case to Chapter 7, award to the PCA its costs and attorneys' fees incurred in connection with this appeal, and grant to the PCA such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

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